

# ARKANSAS SUPREME COURT

No. CR 08-426

DERRICK SHELTON  
Appellant

v.

STATE OF ARKANSAS  
Appellee

**Opinion Delivered** November 20, 2008

PRO SE APPEAL FROM THE CIRCUIT  
COURT OF JEFFERSON COUNTY, CR  
2006-286, HON. ROBERT H. WYATT,  
JR., JUDGE

AFFIRMED.

## PER CURIAM

In 2006, appellant Derrick Shelton entered a plea of guilty to possession of a firearm by a felon, simultaneous possession of drugs and a firearm, and two counts of possession of crack cocaine with intent to deliver. One count of possession was a Class Y felony and the other count was a Class C felony. He was sentenced to an aggregate term of 144 months' imprisonment.

Subsequently, appellant timely filed in the trial court a verified pro se petition under Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition without a hearing, and appellant has lodged an appeal here from the order.<sup>1</sup>

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v.*

---

<sup>1</sup>While on appeal, appellant filed a motion for extension of brief time. However, he timely filed his brief-in-chief, rendering the motion moot.

*State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

Appellant contends that the trial court erred in finding that trial counsel was not ineffective in representing him in the court below. Summarizing the ineffective-assistance claims, appellant maintains that counsel: (1) failed to object to a search warrant based on an incorrect address and inadequate description of the place to be searched; (2) failed to supply appellant with discovery pleadings so that he could assist in his own defense; (3) failed to investigate the case; (4) forced appellant to enter a plea of guilty when he wanted a jury trial; (5) failed to obtain a mental evaluation to determine whether appellant was competent at the time he entered the guilty plea.<sup>2</sup>

Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000).

First, we consider appellant's claim regarding a deficient search warrant. In the circuit court, trial counsel filed a motion to suppress the search of appellant's home as being unconstitutional. The issues raised in the motion were that the address and description of appellant's house were incorrect and a nighttime search of the house was not justified. The trial court denied the motion and found that the description of appellant's house and the basis for a nighttime search were sufficient. In the

---

<sup>2</sup>In addition, the Rule 37.1 petition filed in the trial court contained the argument that counsel failed to preserve the search and seizure argument for direct appeal. Appellant did not make this argument to this court, and claims raised below but not argued on appeal are considered abandoned. *State v. Grisby*, 370 Ark. 66, 257 S.W.3d 104 (2007). He also alleges for the first time on appeal that the trial court erred in denying the motion to suppress. As this argument was not raised in the original Rule 37.1 petition, it will not be considered now. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

Rule 37.1 petition, appellant raised the same arguments.<sup>3</sup> In denying appellant's petition, the trial court noted that the issue had been resolved when the motion to suppress was denied.<sup>4</sup>

This argument is an attempt to re-litigate an evidentiary issue resolved below. Arguments regarding evidentiary issues are not the proper basis for a Rule 37.1 petition. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995). Arguments of this nature constitute a direct attack on the judgment and thus cannot be raised in a postconviction proceeding. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). We affirm the trial court as to this contention.

Appellant next complains that counsel was ineffective for failing to provide him with the motion for discovery filed by the defense. The totality of his argument below and on appeal is that his ability to assist in his own defense was hampered by not being given a copy of this pleading. Appellant provides no further explanation or specific factual support for this statement.

The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). Allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Id.* Such conclusory statements cannot be the basis of postconviction relief. *Jackson, supra*. Appellant fails here to demonstrate that he suffered prejudice as a result of not having the defense discovery motion, and the trial court did not err in denying appellant's Rule 37.1 petition on this point.

Third, appellant argues that counsel was ineffective for failing to investigate the case. However, appellant does not identify the acts or omissions of counsel that allegedly did not give rise

---

<sup>3</sup>On appeal, appellant raised additional arguments in support of the insufficiency of the search warrant. However, these contentions were not raised below in the original Rule 37.1 petition. On appeal, matters outside the scope of the verified petition will not be considered. *Morgan v. State*, 296 Ark. 370, 757 S.W.2d 530 (1988).

<sup>4</sup>The order denying the motion to suppress is not contained in the record on appeal.

to reasonable professional assistance. He states only that his “[l]awyer failed to investigate defendant’s case[.]” By failing to cite specific instances of alleged ineffective assistance to establish this proposition, the contention amounts to a mere conclusory statement which cannot support postconviction relief. *Jackson, supra*. Also, appellant fails to demonstrate that he suffered prejudice as a result of trial counsel’s alleged actions. *Nelson, supra*.

Next, he also contends that he was forced to enter a plea of guilty when he insisted to counsel that he wanted a jury trial. Where a case involves an allegation of ineffectiveness in relation to a guilty plea, the appropriate standard of prejudice is whether, but for counsel’s errors, there is a reasonable probability that the defendant would not have entered a guilty plea and thereby waived his right to a trial. *Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003).

Appellant submits no proof that he wished to proceed to trial on the criminal charges or that his plea was involuntary. The transcript of the guilty plea hearing is not contained in the record on appeal, and the record does not indicate that appellant filed a petition for a writ of certiorari to supplement the appellate record. Appellant fails here to provide this court with the record necessary to conduct a meaningful review of this matter. *Campbell v. State*, 349 Ark. 111, 76 S.W.3d 271 (2002) (per curiam). The party asserting error has the burden to produce a record that is sufficient to demonstrate prejudicial error, and this court does not consider evidence that is not included in the record on appeal. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001).

In the last claim of ineffective assistance of counsel, appellant argues that counsel failed to establish appellant’s alleged mental incompetence. He contends that this mental condition arose from long-term drug use and multiple traumas to his head thereby causing his guilty plea to not be entered intelligently or voluntarily.

Even if a petitioner under our postconviction rule can document a history of mental illnesses or show that counsel could have argued incompetence, a history of mental illness does not in itself entitle the petitioner to relief under the rule. *Henry v. State*, 288 Ark. 592, 708 S.W.2d 88 (1986). Further, appellant in the instant case did not factually document in any way his claim of a history of mental illness. His complete failure to support his claim with proof rendered this alleged claim of ineffective assistance of counsel meritless. *E.g. Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999). The strong presumption in favor of counsel's effectiveness cannot be overcome by a bare claim of a mental deficiency contained in a petition for postconviction relief. *Id.* (citing *Whitmore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989)). The trial court did not err in denying appellant's claim on this point.

Affirmed.